***United States Court of Appeals***

***for the Second Circuit***

# INTERVENOR'S BRIEF

ORIGINAL

# 76-4049, 4061, 4074

In The

UNITED STATES COURT OF APPEALS

For The Second Circuit

---

ITT World Communications, Inc.,
RCA Global Communications, Inc.,
and Western Union International, Inc.,
Petitioners

V.

Federal Communications Commission
and United States of America
Respondents

-and-

American Telephone & Telegraph Company,
Xerox Corporation,
Hawaiian Telephone Company,
American Petroleum Institute,
Intervenors

---

Petition for Review of a Report and Order
of the Federal Communications Commission

B
P/S

BRIEF OF INTERVENOR
AMERICAN PETROLEUM INSTITUTE

Keller & Heckman
Attorneys for Intervenor
American Petroleum Institute
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 296-2700

Of Counsel:

Charles M. Meehan
and
Joseph E. Keller
Wayne V. Black
Larry S. Solomon

Dated: September 10, 1976

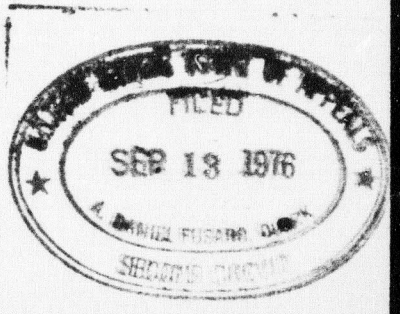

TABLE OF CONTENTS

TABLE OF AUTHORITIES

## PRELIMINARY STATEMENT

Intervenor American Petroleum Institute ("API"), by its Central Committee on Telecommunications, hereby respectfully submits this Brief in support of the Report and Order ("Order") released by the Federal Communications Commission ("Commission" or "FCC") on January 19, 1976, [1/] which set forth a general policy statement indicating that the Commission recognized the need for the international record carriers ("IRCs") [2/] to expand their switched record services and to interconnect their facilities with the American Telephone and Telegraph Company's (AT&T) domestic MTS telephone network for this purpose (Order ¶12, A-7); and wherein the Commission stated that its policy would be to accept Section 214 applications [3/] from AT&T for the provision of international alternate voice and data (AVD) services (Order ¶17, A-9).

---

1/ In the Matter of Inquiry Into Policy to be Followed in Future Authorization of Overseas Dataphone Service, 57 F.C.C. 2d 705 (1976); The Report and Order is reproduced herein in the Joint Appendix (A) at pp. A-1-9.

2/ The Petitioners herein are the three major IRCs, namely Western Union International, Inc. (WUI); ITT World Communications, Inc. (ITT Worldcom); and RCA Global Communications, Inc. (RCA Globcom).

3/ 47 U.S.C. §214.

The Central Committee on Telecommunications (Central Committee) is one of the standing committees of the General Committee of Transportation of the API. Members of this Central Committee represent over 400 of the leading oil and natural gas companies in this country. This Central Committee is, in turn, supported and sustained by more than 500 petroleum and natural gas industry communications users.

The petroleum industry is a substantial user of international communications facilities. Overseas communications are used in connection with all phases of the petroleum industry's activities, commencing with the exploration for vital energy resources, and extending through various stages of production, transportation, refining and distribution of petroleum products. The petroleum industry has been faced with the need for international communications in both voice and data modes for years, and the number of companies with multi-national interests continues to grow as the search for new energy sources continually expands around the globe. Due to such extensive operations, it is imperative that the petroleum and natural gas industries have access to the most effective and efficient international communications facilities available through the application of current technology.

One of the most obvious needs for flexible, reliable and efficient overseas communications in the petroleum industry is the transmission of facsimile and slow speed data related to exploratory operations throughout the world back to central facilities capable of analyzing potentials and procedures for maximizing energy reserves. Under the present international communications offerings, users are unfortunately faced with transmission delays and dubious reliability of overseas data transmission because of the requirements for retransmission, and the like. API submits that improved efficiency, reliability and flexibility could be assured with direct international voice and data service provided, which would, in turn, enhance the ability of the petroleum and natural gas industries to provide the nation with the crucial energy supplies it demands.

In fact, API stated in its Comments submitted to the FCC in this proceeding that:

> "The public interest may best be served by the provision of these direct international voice and data services from alternative sources. Thus, users should be able to secure (1) direct service through the domestic carrier's local and overseas facilities, or (2) interconnected service via a domestic carrier and an international carrier of record. It is essential, however, that the facilities to be provided by the carriers be established on a compatible basis. If necessary, appropriate operating procedures and standards should be established to assure the availability of competitive compatible alternatives." (A-69, ¶5).

Although API believes, as is evidenced by its Comments, that the IRCs and AT&T should be allowed to provide overseas AVD services on an equal basis, it is the belief of the API that this decision is not proper for the Court to make at this time. The integrity of the administrative agency in exercising its congressionally delegated discretion should not be impaired by the courts. In the instant proceeding, as the following arguments attempt to demonstrate, the Commission was validly exercising its administrative discretion in adopting a general policy which has no immediate and substantial impact upon the Petitioners at this time. Consequently, those issues raised by the Petitioners are not ripe for review. The Court should therefore find that the FCC's Report and Order, insofar as it relates to issues raised by the Petitioners, is not subject to review.

## ISSUES PRESENTED FOR REVIEW

In an effort to avoid unnecessary duplication, API will not present a counterstatement of the case, or arguments which it believes will be raised by the Commission. Instead, API wishes to place emphasis on those issues which it believes are most significant in the instant proceeding. Therefore, only the following two issues will be addressed in this Brief:

(1) Whether the adoption of a general policy statement indicating that the Commission would accept Section 214 applications from AT&T for the provision of dataphone-type service is a proper exercise of administrative discretion?

(2) Whether the FCC should be given an opportunity to interpret and implement its own policy statement before the matter is a proper subject for review by this court?

## ARGUMENT

### POINT I

### THE COMMISSION'S REPORT AND ORDER IN THE INSTANT PROCEEDING WAS A STATEMENT OF GENERAL POLICY REPRESENTATIVE OF A VALID EXERCISE OF ADMINISTRATIVE DISCRETION

The FCC's action under review amounted to a mere policy statement, announcing future procedures to be followed by the agency, and having no immediate and substantial impact upon the Petitioners. In an attempt to tailor the "definition" of the Commission action, Petitioners have variously characterized the instant proceeding as a rule making proceeding and a policy making proceeding.

Since different criteria are applicable in each instance, this vascillating characterization of the proceeding appears to have been adopted by the Petitioners so as to confuse the issues involved, and to make uncertain the specific standards applicable to the Commission in adopting its policy, and those to be followed by this Court in reviewing the Commission's action. A preliminary task of this Court then is to define the type of proceeding involved, and apply the appropriate criteria of review applicable to that proceeding.

Granted, it can be an exceedingly difficult task to draw the line between a rule and a policy statement. Professor Davis, in his Administrative Law Treatise, has indicated that "...an attempt to distinguish a rule from an announcement of policy which is not a rule seems likely to yield a fuzzy product...." [4/] The United States Court of Appeals for the District of Columbia has, however, defined the "fuzzy" perimeters of a general statement of policy in Pacific Gas and Electric Company v. F.P.C., 506 F.2d 33 (D.C. Cir. 1974).

In Pacific Gas and Electric, supra, the Court upheld, as a general policy statement, a priority schedule for curtailing supplies of natural gas, even where the FPC did not give notice of this proceeding or allow interested parties to comment. The Court found that the definition of a rule found in §2(c) (5 U.S.C. §551 (4)) of the Administrative Procedure Act (APA) could be literally read to encompass virtually all utterances of an agency, including general policy statements, but that §4(a) of the APA (5 U.S.C. §553(b)(A)) exempted general statements of policy from public notice requirements. [5/] Therefore, the Court drew the

---

4/ I K. Davis, Administrative Law Treatise §5.01 at 290 (1958).

5/ 506 F.2d at 37.

distinction between a rule and a general statement of policy, which was defined as:

> "...the outcome of neither a rule making nor an adjudication, it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rule makings or adjudications. A general statement of policy, like a press release, presages an upcoming rule making or announces the course which the agency intends to follow in future adjudications." (Citations Omitted) 506 F.2d at 38.

Thus, a general statement of policy does not establish a binding norm, nor is it finally determinative of the issues or rights to which it is addressed.[6/] Rather, it applies prospectively, and the courts will thus have an opportunity to police further actions. A substantive rule, on the other hand, is couched in terms of command and establishes a standard of conduct which has the force of law.

Inasmuch as the agency's own characterization of a particular order and the form of regulations flowing therefrom provide some indication of the nature of the announcement,[7/] the Commission's action in the instant

---

6/ Id. at 38

7/ See, Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407 (1942); Texaco, Inc. v. F.P.C., 412 F.2d 740 (3d Cir. 1969).

proceeding should be examined. Since its inception, the instant proceeding has been couched in terms of a policy statement. The Notice of Inquiry formally initiating the proceeding was entitled "Inquiry Into Policy To Be Followed In Future Authorization of Overseas Dataphone Service." (A-10) At paragraph 8 of its Notice of Inquiry, (A-13) the FCC stated that it did not believe that the processing of individual applications[8/] "would be a satisfactory method of arriving at policy determination in this matter." The Commission went on to state that "we feel that we can best resolve the various questions by adopting policies governing the provision of dataphone service in the context

---

8/ It should be noted that the application which was dismissed by the Commission was fatally defective. (Notice of Inquiry ¶8, A-4) Furthermore, no other applications were on file. Thus, Petitioner ITT Worldcom's allegation that the Ashbacker doctrine (326 U.S. 327 (1945)) should be applied is completely without merit. The Ashbacker doctrine concerns itself with mutually exclusive applications, i.e. those instances wherein only one of the applicants can provide a specific type of service. In the instant situation not only was there not a viable application on file with the Commission, but there is not, nor has there ever been any allegation that the provision of overseas dataphone-type services are or should be provided on a mutually exclusive basis. Notwithstanding the foregoing, there was not even a competing application on file.

of this Inquiry rather than in passing on separate applications by the carriers to provide such service." (¶9, A-14)

In the Report and Order which was adopted (A-1) the Commission stated, in the opening sentence, that the proceeding was initiated in order to request "...Comments regarding future Commission policies governing the provision of overseas dataphone-type services." (Footnote Omitted, ¶1, A-1). Again, in the concluding paragraphs of its Report and Order, the Commission stated that "this proceeding is a policy-making inquiry based upon the general international communications environment and the need for the initiation of certain switched services." (¶17, A-9) In the following sentence, the Commission indicated that what reached in this proceeding were policy decisions. (¶17, A-9) Finally, in its "ordering' paragraph (¶20, A-9) the Commission indicated that the Chief, Common Carrier Bureau, "is directed to accept for filing applications from both the American Telephone and Telegraph Company and the international record carriers in accordance with this Report and Order."

Admittedly, this final "order" of the Commission is subject to differing interpretations. Nevertheless, until these interpretations are clarified, there is

no immediate and substantial impact upon the IRCs. This is especially true in light of the fact that in the normal course of business at the Commission, the acceptance of an application for filing does not indicate that the Commission will necessarily grant such application.[9/] Furthermore, the Commission never indicated that it would not accept applications from the IRCs to provide international AVD services.

A good example of a situation which involves a substantive rule, as opposed to a general statement of policy, being adopted by the FCC can be found in Columbia Broadcasting System v. United States, 316 U.S. 407 (1942). In that case, the Commission promulgated "regulations", couched in terms of command, refusing to issue a new license, or renew an existing license, in instances where the applicant was a party to a certain type of contract with a so-called chain broadcasting network. CBS had entered into several of the types of outlawed contracts with its affiliated stations resulting in the fact that such stations, as a result of the Commission's Order, had to either cancel their contracts[10/] or not be permitted to hold a broadcast license.

---

9/ See, for example, 47 C.F.R. §21.26(b).

10/ These contracts were generally for a five-year term, while licenses had to be reviewed annually.

The Court in CBS found an instance where the Commission action represented an immediate and significant impact upon CBS business since there existed evidence that the issuance of the regulations by the FCC caused the immediate cancellation or failure to renew several of the contracts. These "wholesale cancellations" seriously disrupted CBS's organization and impaired its very ability to conduct its business.[11/]

No such immediate and substantial impact has been shown to exist by Petitioners in the instant proceeding. There has been no final approval of any AT&T application, nor disapproval of any acceptable IRC application. Therefore, there has been no final, inflexible impact upon the Petitioners. The possibility that Petitioners might be subject to some impairment, does not compare with the significant and immediate impact of the regulations in CBS, supra, where there existed no room for speculation as the regulations promulgated by the FCC had the force of law.

The Administrative Procedure Act excepts from the requirements of public notice an agency statement of general policy.[12/] Due to this exception, the agency

---

11/ Id. at 413, 414-415, 418, 423.

12/ 5 U.S.C. §553(b)(A).

is not required to give notice of its proposed policy or receive any comment thereon.[13/] In the instant proceeding, however, the Commission gave interested parties the opportunity to file both Comments and Reply Comments. Thus, interested parties were given ample notice of a proposed policy to be formulated by the Commission, and an opportunity to submit documents, data and arguments as they chose. Petitioners not only set forth their own views and data, but were also permitted to examine the opposing comments and data submitted by others and to criticize that material.

In addition, the Commission issued a Report and Order which clearly addressed the issues presented in Comments and, in exercising its administrative discretion, delineated those reasons for choosing policies which it felt were necessary in carrying out its mandate, in the public interest, of making available a "...rapid efficient...world wide wire and radio communication service with adequate facilities at reasonable charges." [14/]

---

13/ See, Pacific Gas and Electric Co. v. F.P.C., supra.

14/ 47 Y.S.C. §151.

Since the Commission action under review caused no immediate substantial harm to the Petitioners, and because the action was not finally determinative of the issues or rights to which it is addressed, it amounted to a general policy statement. The FCC's action therefore represented even more than what is required under the Administrative Procedure Act, and was thus a valid exercise of administrative discretion.

## POINT II

## THE COMMISSION SHOULD BE GIVEN THE OPPORTUNITY TO INTERPRET ITS OWN ORDER AND UNTIL SUBSTANTIVE RIGHTS ARE AFFECTED THIS PROCEEDING IS NOT RIPE FOR JUDICIAL REVIEW

Justice requires that reviewable governmental action should be reviewable when it causes substantial present harm to the business interests of the challenging party.[15/] As was discussed in the foregoing argument, the Petitioners herein have failed to demonstrate that any hardship was immediately imposed upon them since the Commission action in question can have no impact until such time as further action is taken by the FCC. Thus, as to the Petitioners' claims,

---

15/ III K. Davis, Administrative Law Treatise §21.06 at 157 (1958).

they are not currently ripe for review.

The basic rationale behind the ripeness doctrine is to prevent the Court, through the avoidance of premature adjudication, from an entanglement in abstract disagreements over administrative policies. Furthermore, it is to protect the agencies from judicial interference until such time as an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties. The problem is best seen in a two-fold aspect, requiring the Court to (1) evaluate the fitness of the issues for judicial decision; and (2) evaluate the hardship to the parties of withholding Court consideration.[16/] Inasmuch as the instant proceeding provides an instance where the impact of the Commission action upon the Petitioners is not sufficiently direct and immediate, the issues and questions are not rendered appropriate for a judicial review at this stage.[17/]

---

16/ Abbott Laboratories v. Gardner, 387 U.S. 135, 148-149 (1967). This same two-fold test was adopted by this Court in Toilet Goods Association v. Gardner, 360 F.2d 677, 684 (2d Cir. 1966), aff'd 387 U.S. 158 (1967).

17/ See, California Bankers Association v. Schultz, 416 U.S. 21 (1974). The policy statement challenged in the instant proceeding is not analagous to those regulations which were challenged in Columbia Broadcasting System, supra and United States v. Storer Broadcasting Company, 351 U.S. 192 (1956) where the impact of the administrative action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs. See also, F.C.C. v. American Broadcasting Company, 347 U.S. 284 (1954).

One of the critical allegations raised by the Petitioners is that should the Commission allow AT&T to provide overseas AVD services, and allow the IRCs to provide only record services, this would have a disastrous economic effect on the IRCs. Petitioners, however, have no manner in which to prove this. It has been consistently held by the courts that possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action.[18/]

Applying the test set forth in Abbott Laboratories, supra, an examination must first be made as to the fitness of the issues for judicial decision. The Commission action here under review is admittedly subject to differing interpretations. The Petitioners are urging this Court to make an interpretation of an Order of the Federal Communications Commission which the FCC has not itself yet made. As the United States Supreme Court held in Securities and Exchange Commission v. Chenery Corp., 318 U.S. 84 (1954),

---

18/ Frothingham v. Mellon, 262 U.S. 447 (1923); Perkins v. Lykens Steel Co., 310 U.S. 113 (1940).

> "if an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress had exclusively entrusted to an administrative agency."

The construction of the Commission's action in the instant proceeding is a matter for the exercise of the Commission's discretion, and the Court should do no more than see that this discretion is properly exercised.[19/]

The issues in question in the instant proceeding clearly demonstrate that there are several factors which must be considered by the Commission before any substantial and material effects can be felt by the Petitioners. For example, although the Commission stated that it would now accept Section 214 applications from AT&T for the provision of AVD overseas services, it did not specifically state that such applications filed by the IRCs would be rejected. Furthermore, any challenge to an application filed by AT&T for these services, can be properly challenged at the Commission level. The Communications Act of 1934, as amended, provides adequate procedures for opposing applications which are

---

19/ Poole Broadcasting Company V. F.C.C., 442 F.2d 825, 831 (D.C. Cir. 1971).

placed on file with the Commission.[20/] Moreover, should the IRCs desire to provide similiar service, they may also file such applications with the Commission.

Once the Commission acts on an application, adequate procedural remedies ar provided in the Commission's Rules to challenge the Commission's action.[21/] In addition, Petitioners challenge the Commission's alleged failure to deal with the interconnection problem. The Commission has not formally been squarely faced with this issue, and has not made any determination on this issue. Therefore, it should be left to the Commission, and not the Court, to decide that issue.

The Court must preserve and respect the distinctive role of an administrative agency, and the Court should not encroach on the agency's permissible zone of discretion. Judicial review of action taken by an administrative agency should involve a combination of the Court's "supervisory" function, that of reviewing agency decisions and assuring that there has been conformance with the pertinent requirements of the law, and the Court's responsibility of restraint, that of avoiding intrusion into the area of discretion and choice of policy vested

---

20/ See, 47 U.S.C. §309(d).

21/ See generally, 47 C.F.R. §1.101-1.120.

by Congress in the agency. Greater Boston Television Corp. v. F.C.C., 463 F.2d 268 (D.C. Cir. 1971) cert. denied 406 U.S. 950 (1972)

It is therefore respectfully submitted that the points supporting judicial resolution of the instant proceeding are far outweighted by other considerations. The Commission is still free to dilute its policy as it sees fit. The actual construction of the policy and its application to particular situations is still in the hands of the Commission. The action taken by the FCC in this instance serves notice only of what policy the Commission may follow in the future. Judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific situation arising under the Commission's announced policy wherein the Commission, pursuant to its Rules and Regulations, makes a determination. That would be a much more appropriate framework in which to bring the challenge than the generalized challenge made herein.[22/] This Court has stated in Toilet Goods Association v. Gardner, 360 F.2d 677 (2d Cir. 1966), aff'd 387 U.S. 156 (1967), that:

---

22/ Toilet Goods Association v. Gardner, 387 U.S. 156 (1967).

> "The appropriateness of passing judgment on the validity of an administrative regulation prior to its application to particular facts depends on such factors as how far the rule represents the definitive position of the agency and the extent to which the challenge raises a clear cut legal issue susceptible of judicial solution without reference to fact variables arising in its implementation. Review might be considered premature wherein agency rule had not received substantially as full consideration in its formulation as it would have in subsequent application, or where future experience would be likely to result in significant modifications as to its precision or scope." (Citations Omitted) 360 F.2d at 685.

As in the above quoted case, the possibility of unlawful injury to the Petitioners is, on its face, too remote at this time. There is no demand of compliance at the expense of penalties, nor is there any indication as to how the FCC will finally act when presented with a specific application. No immediate adverse consequences will flow from requiring a later challenge to the Commission's policy, if necessary.

As Justice Frankfurter stated in his dissenting opinion in CBS, supra:

> "...Congress has not authorized resort to the federal courts merely because someone feels aggrieved, however deeply, by an action of the Federal Communications Commission." 316 U.S. 429

## CONCLUSION

For the foregoing reasons, the American Petroleum Institute respectfully prays this Honorable Court to hold that the action of the Federal Communications Commission is not a reviewable order at this time.

Respectfully submitted,

KELLER and HECKMAN
Attorneys for Intervenor
American Petroleum
Institute

1150 17th Street, N.W.
Washington, D.C. 20036
(202) 296-2700

Of Counsel:

Charles M. Meehan

and

Joseph E. Keller

Wayne V. Black

Larry S. Solomon

Dated: September 10, 1976

CERTIFICATE OF SERVICE

I, Janet L. Kniedler, a secretary in the law firm of Keller and Heckman, hereby certify that the foregoing Brief of Intervenor American Petroleum Institute was duly served this 10th day of September, 1976, by making true copies thereof, postage prepaid, to the following persons:

John I. Ingle, Esquire
Federal Communications Commission
Washington, D.C. 20554

Charles P. Sifton, Esquire
LeBoeuf, Lamb, Leiby & MacRae
140 Broadway
New York, New York 10005

Carl D. Lawson, Esquire
Department of Justice
Washington, D.C. 20530

H. Richard Schumacher, Esquire
Cahill, Gordon & Reindel
80 Pine Street
New York, New York 10005

Alvin K. Hellerstein, Esquire
Stroock & Stroock & Lavan
61 Broadway
New York, New York 10006

Charles H. Helein, Esquire
Dow, Lohnes & Albertson
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036

Thomas J. O'Reilly, Esquire
Chadbourne, Parke, Whiteside
& Wolff
1150 17th Street, N.W.
Washington, D.C. 20036

Alfred G. Walton, Esquire
Randall B. Lowe, Esquire
American Telephone &
Telegraph Company
32 Avenue of the Americas
New York, New York 10013

Janet L. Kniedler
Janet L. Kniedler